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No. 82-5089

In The

# Supreme Court of the United States

October Term, 1982

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EVERETT T. JONES,

*Appellant,*

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES,

*Appellee.*

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On Appeal From The Supreme Court Of Virginia

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## MOTION TO DISMISS

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On Appeal From The Supreme Court Of Virginia

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## MOTION TO DISMISS

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Appellant, Fredericksburg Department of Public Welfare and Social Services, prays this Court to dismiss this appeal from a judgment of the Supreme Court of Virginia on grounds hereinafter set forth:

## JURISDICTION

Jurisdiction in this matter is sought under 28 USC 1257 (2). Appellant moves the Court to dismiss this appeal on the grounds that:

1. It does not present a substantial federal question.
2. Questions sought to be reviewed were not properly raised and were not expressly passed upon.
3. The judgment below rests on a non-federal basis.

## STATEMENT OF THE CASE

### Lower Court Proceedings

The Fredericksburg Department of Public Welfare and Social Services (hereinafter referred as to "Welfare Department" or "Department") assumed emergency custody of Russell Knorr, then age six (6), on September 26, 1980, pursuant to an emergency removal order entered by the Juvenile & Domestic Relations Court of the City of Fredericksburg after an *ex parte* hearing pursuant to a petition by the department alleging that "the child's custody is in need of determination".

On September 29, 1980, at the conclusion of a hearing at which all parties were represented, the Judge of the Juvenile & Domestic Relations Court returned the child to Everett Jones and ordered further investigation and a full hearing at a later date. That hearing was held on November 13, 1980. The court, at that time, granted custody of Russell Knorr to the welfare department. Everett Jones filed an appeal.

On December 18, 1980, after a hearing on Jones' motion for a preliminary removal order, the Circuit Court of the City of Fredericksburg granted one week visitation to Everett Jones in his home from December 25, 1980, to January 2, 1981.

The case on appeal, *Fredericksburg Department of Public Welfare and Social Services* v. *Everett T. Jones,* was heard by the Circuit Court of the City of Fredericksburg on March 20, 1981, and counsel were permitted to file post hearing memoranda. A memorandum of opinion was issued by the trial judge on May 14, 1981, and a final order was entered by the court on June 10, 1981, granting custody of the child to the local welfare department.

Everett Jones filed his petition for writ of appeal with the

Supreme Court of Virginia in September, 1981. A responsive brief was filed by the welfare department. On April 20, 1982, the Supreme Court of Virginia refused the petition for appeal, finding no reversible error.

Notice of appeal to the United States Supreme Court was mailed by appellant's counsel to appellee's counsel on July 13, 1982, but was never received by counsel for appellee. Appellee, however, received its copy on July 14, 1982. The jurisdictional statement was received by counsel for appellee on July 20, 1982.

### Appellee's Statement of Facts

Russell Knorr is the illegitimate child of Helen Knorr. His father is alleged by the mother to be a man named Russell Harding. Shortly after his birth, the mother apparently left the child with neighbors, appellant Everett Jones and his live-in companion, Blanche Lowman.

In December, 1977, the child's mother signed a notarized statement giving her consent for Everett Jones to adopt her son. A petition for adoption was filed by Jones in the Circuit Court of the City of Fredericksburg but was withdrawn when appellee, as the investigating agency under the law, recommended that his petition be denied. The matter was referred to the child protective services section of the welfare department at that time.

In 1978, Helen Knorr signed a statement purporting to name Everett Jones as guardian of the child. The child's father was not a signator nor was any separate document executed by him. No court reviewed the matter.

In 1979, Russell Knorr was evaluated by various personnel at the Child Development Center, to which he had been referred by his pediatrician, Dr. John Painter, because of behavior problems. The child was diagnosed as having

minimum brain dysfunction syndrome (hyperactivity, poor impulse control), which creates a need for special structure and discipline in his life. The caretakers, Jones and Lowman, were advised to seek behavior management counseling to improve their parenting skills. Among the complaints of the caretakers were Russell's fascination with fire and aggressive behavior. The child was later placed on medication to assist in controlling his behavior, although the doctor indicated that the usual treatment was to employ psychological counselors to teach behavior modification techniques for the child to the parents or parent-figures.

Everett Jones did not receive any such counseling, nor did he seek it. Blanche Lowman went once to the Rappahannock Guidance Clinic but, for reasons in dispute, she did not return to seek further counseling.

At about the same time, in March, 1979, respondent welfare department reopened its protective services file on Russell Knorr after a report that he jumped from a second-floor balcony.

In the fall of 1980, both Everett Jones and Blanche Lowman were hospitalized. The child was left in the care of one Mrs. Grimes, who herself sought assistance from the welfare department at that time because she was having difficulty walking. Also, at the same time, it was reported to the welfare department that the child, then six (6) years of age, was wandering alone along the Rappahannock River. Representatives of the welfare department talked with Mr. Jones about placing the child in foster care. Conversations with Joyce Rector, Mrs. Jones' only known relative, indicated she was unable to care for the child.

Appellee filed a petition on September 26, 1980, alleging that the "child's custody is in need of determination". After an *ex parte* hearing, the Juvenile & Domestic Relations

Court entered an emergency removal order, and the child was removed from Mrs. Grimes' home. At a later hearing on September 29, 1980, the child was returned to Everett Jones on a temporary basis and further investigation was ordered by the court.

In October, 1980, Russell Knorr told the resident manager of the apartment complex where he lived with Everett Jones and Blanche Lowman that he had used a lighter to start a fire in a clump of trees behind one of the apartment buildings that day. The incident was reported by the resident manager to the child's babysitter.

A full hearing on the custody petition was held on November 13, 1980, at which time the Juvenile Court entered an order awarding custody to the Fredericksburg Welfare Department. The Circuit Court of the City of Fredericksburg heard the case *de novo* on March 20, 1981. A memorandum opinion was filed by the court on May 14, 1981, and the final order was entered on June 10, 1981, awarding custody to appellee. The judge's memorandum opinion cited the fact that Everett Jones was living with a woman to whom he was not married and that neither party had provided the supervision and "firm loving discipline" which the child required. He found them to be unfit because of "their economic and health conditions *and their inability to fulfill normal parenting responsibilities* (emphasis added)". The memorandum opinion and the final order entered by the Court make clear that the only issue being decided was the temporary custody of Russell Knorr, which was awarded to the welfare department.

The child has remained in foster care since November, 1980, with the exception of a one week visitation in December, 1980-January, 1981.

After the denial of the petition for a writ of appeal by

the Supreme Court of Virginia, the Fredericksburg Department of Public Welfare and Social Services instituted proceedings in the state court to terminate the rights of the natural parents, Helen Knorr and Russell Harding.

Appellant Everett Jones is a sixty-seven year old retired man living on a $266.00 monthly income. He has asthma and is subject to recurrent respiratory infections which require hospitalization from time to time. He cannot walk up a flight of steps or more than a city block without stopping to catch his breath. He has had a meretricious relationship with Blanche Lowman, aged thirty-seven, in the past. He indicates that the sexual nature of the relationship ended at approximately the same time as his surgery for cancer of the prostate. He and Blanache Lowman continued to live in the same household without benefit of marriage. It was apparent from the testimony that much of the daily care of and responsibility for Russell was left to Blanche Lowman, although she is not a party to this suit.

Blanche Lowman is a thirty-eight year old woman with recurrent leg ulcers which require periodic hospitalization. She was described by experts as having a manic condition, characterized by mood swings.

## ARGUMENT

(1) This case does not present a substantial federal question. This is a case of temporary custody, not a case of termination of parental rights such as in *Stanley* v. *Illinois,* 405 U.S. 645 (1972), or *Santosky* v. *Kramer,* 50 L.W. 4333 (1982). Appellant is not the father or the reputed father, *Stanley* v. *Illinois,* supra, or a member of the nuclear or extended family, *Moore* v. *East Cleveland,* 421 U.S. 494 (1976), or legal custodian of the child, *Prince* v. *Massachu-*

*setts,* 321 U.S. 158 (1944). He has attempted, by use of psychiatric evidence, the testimony of a clinical psychologist and several books [*Before the Best Interest of the Child,* J. Goldstein, A. Fraud, A. Solnic (1979 Edition), and *Beyond the Best Interest of the Child,* J. Goldstein, A. Fraud, A. Solnic (1979 Edition)] to elevate his position from that of a caretaker or a person in loco parentis to a natural parent. If this were a termination hearing such as in *Stanley* v. Illinois, supra, or *Santosky* v. *Kramer,* supra, or *Alsegar* v. *District Court of Polk County, Iowa,* 406 F. Supp. 10, 545 F. 2d 1137 (1975), this change to a favored position would be critically important. But, this was not a termination hearing. It was a hearing for temporary custody. Appellant's counsel has cited *Alsegar* v. *District Court of Polk County, Iowa,* supra, and has discussed this case at length; however, counsel has failed to point out that the *Alsegar* case didn't rule on temporary custody. See *Alsegar* v. *District Court of Polk County, Iowa,* supra, at Page 16, Footnote 3:

> "The Court's ruling goes only to state action which permanently destroys the family unit, not to temporary physical separation for the protection of the child. Further, the Court expresses no opinion as to the constitutionality of Iowa's summary removal procedure..."

This case, moreover, does not present a substantial federal question concerning "due process". Virginia Code Section 16.1-241(A)(3) gives the Juvenile & Domestic Relations Court of Virginia jurisdiction to determine the custody, visitation, support, control or disposition of a child "whose custody, visitation or support is a subject of controversy or requires determination".

It is submitted that no allegation need be made other than

"the child's custody requires determination". This was done in the petition filed. Appellant was allowed to attend two separate court hearings, the second being a hearing *de novo*. He was represented by counsel at both hearings, was allowed to testify, have witnesses in his own behalf, and to cross examine other witnesses. Appellant's counsel was present at the time of each of the hearings as was the Appellant. Counsel was aware of the discovery procedure available under the Rules of Court of the Commonwealth, for Appellant's counsel took depositions of various witnesses. Virginia Rules of Court provide for broad discovery, all of which were available to Appellant and his counsel, had there been any question as to the nature of the hearing. Counsel has not alleged that Appellant was surprised by any of the testimony in either court. He is unhappy about the outcome of the case, but so is everyone else involved in this custody case and virtually every other custody case, since the question of custody is never really closed until the child has become self-sufficient. In the meanwhile, parents, guardians, custodians, persons in loco parentis, social service agencies, the State, the courts, and the nation owe it to each child to make that child self-sufficient as soon as possible. A seven year old with special needs cannot afford to wait around while lawyers and courts play with subtle Constitutional niceties. The question at this point must be, and can only be, "What is in the best interest of the child?". In *May* v. *Anderson*, 345 U.S. 528 (1953), at page 536, Mr. Justice Frankfurter observed,

> "Children have a very special place in life which the law should reflect. Legal theories and their phrasing in other cases readily lead to fallicious reasoning if uncritically transferred to determination of a state's duty toward children."

The state's obligation to make determinations of custody from time to time is a responsibility which cannot be shirked and should not present a substantial federal question unless it is clearly wrong on the facts set forth.

(2) The question sought to be reviewed was not properly raised and has not been expressly passed upon. Appellant has cited a number of Virginia statutes but he has not alleged that any of these are repugnant to the Constitution, treaties, or laws of the United States.

Neither the Circuit Court of Fredericksburg nor the Supreme Court of Virginia has made a decision in favor of the validity of any statute. Neither Judge Jamison's Memorandum of Opinion (see Appellant's Index A-1) or the order of the Circuit Court of the City of Fredericksburg (see Appellant's Index A-5) raise Constitutional questions. It is admitted that Appellant's post hearing Memorandum of Law and Appellant's Petition for Writ of Error to the Supreme Court of Virginia make vague Constitutional allusions to the construction of various statutes, but Appellant has never alleged that the statutes themselves were unconstitutional or were repugnant to the Treaties or Laws of the United States. On the contrary, Appellant's counsel in Post Hearing Memorandum of Law, Page 12 (Appellant's Appendix A-40, 41), states "The Virginia Statute, on the other hand, is a model of clarity".

Appellant has cited numerous statutes, yet he has not alleged that any of these statutes are repugnant to the Constitution, Treaties or Laws of the United States, and, accordingly, this action should not fall under Section 28 USC 1257 (2) and should be dismissed.

(3) Finally, the Appellee moves to dismiss this action on the grounds that the judgment below rests on a non-federal basis. The Juvenile & Domestic Relations Court

of the City of Fredericksburg found after preliminary hearing that the custody of Russell M. Knorr should be placed with the Fredericksburg Department of Social Services. Russell Knorr's Guardian ad Litem did not appeal this finding to the Circuit Court of the City of Fredericksburg; however Everett Jones did appeal. The Circuit Court of the City of Fredericksburg found that Everett T. Jones "was not the legal guardian of the child with vested custody rights." (Appendix A-1). Furthermore, the Court found that "Blanche Lowman and Everett Jones are not fit and proper persons within the meaning of Virginia law to have custody of the said Russell Knorr . . ." (Appendix A-1). The finding that Everett Jones was "not a fit and proper person within the meaning of Virginia law to have custody of the said Russell Knorr" should be dispositive of the case.

The Appellee, therefore, respectively moves the Court to dismiss this case for lack of jurisdiction for each of the preceding reasons set forth.

FREDERICKSBURG DEPARTMENT OF WELFARE AND SOCIAL SERVICES

By H. HARRISON BRAXTON, JR.

P. O. Box 7005
Fredericksburg, Virginia 22404

By ANN P. PALAMAR

P. O. Box 972
Fredericksburg, Virginia 22404

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF FREDERICKSBURG

IN RE: RUSSELL KNORR, a child
D.O.B. 1/1/74

(FREDERICKSBURG DEPARTMENT OF
PUBLIC WELFARE AND
SOCIAL SERVICE

vs.

EVERETT T. JONES)

## ORDER

This case was heard on March 20, 1981, on a petition of the Fredericksburg Department of Public Welfare and Social Service that the custody of the child, Russell Knorr, was in need of determination. After hearing testimony and considering the written arguments by counsel for petitioner and respondent, the Court makes the following findings:

1. That the Juvenile and Domestic Relations Court of the City of Fredericksburg had jurisdiction to hear and decide this case pursuant to Section 16.1-241A of the Code of Virginia (1950), as amended;
2. That a final order was entered by the Juvenile and Domestic Relations Court of the City of Fredericksburg on November 13, 1980;
3. That this Court has jurisdiction to hear and decide this case on appeal, pursuant to Section 16.1-296 of the Code of Virginia (1950), as amended;
4. That Russell Knorr is the natural child of Helen Knorr, who was present but did not testify at the hearing on March 20, 1981;

5. That, at the time of the original petition, Russell Knorr resided in the City of Fredericksburg;
6. That Everett Jones and Blanche Lowman are not legal guardians of this child with vested custody rights;
7. That Everett Jones and Blanche Lowman are not married and, although the evidence indicates they have not had sexual relations in five years, they live together as two adults of the opposite sex.
8. That Blanche Lowman and Everett Jones are not fit and proper persons, within the meaning of Virginia law, to have custody of the said Russell Knorr; and,
9. That it is in the best interests of the child, Russell Knorr, that his custody be awarded to the Fredericksburg Department of Public Welfare and Social Service.

WHEREFORE, the Court does ORDER that custody of Russell Knorr shall be and hereby is granted to the Fredericksburg Department of Public Welfare and Social Service.

ENTER THIS:

JOHN A. JAMISON, *Judge*

Date: June 10, 1981

I ASK FOR THIS:

ANN P. PALAMAR
*Counsel for Fredericksburg Department of Public Welfare*
P. O. Box 972
Fredericksburg, Virginia 22401

SEEN:

C. BLACKWELL TACKNEY
*Counsel for Everett Jones*
RAPPAHANNOCK LEGAL SERVICES, INC.
910 Princess Anne Street, 2nd Floor
Fredericksburg, Virginia 22401

**CERTIFICATE OF SERVICE**

I, Ann P. Palamar, Associate Counsel, hereby certify that pursuant to Rule 28, three copies of this Motion to Dismiss were delivered to the office of Charles D. Bennett, Jr., Esquire, counsel for Appellant, Rappahannock Legal Services, 910 Princess Anne St., Fredericksburg, Virginia 22401, and were "delivered to him personally" or "delivered to an employee therein", on the 17th day of August, 1982.

Ann P. Palamar

ANN P. PALAMAR

**AFFIDAVIT**

Before me, the undersigned authority, this day appeared Ann P. Palamar, who, upon her oath, states that the facts set forth in the above Certificate of Service are true to the best of her knowledge and belief.

Diane Converse

*Notary Public*

My Commission expires: 7-15-83